Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CAESAR HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal conviction may be sustained based upon otherwise insufficient evidence simply because the defendant has taken the stand and plausibly testified that he is *not* guilty?

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PETITION FOR A WRIT OF CERTIORARI

Caesar Hernandez ("petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a) is unreported.

JURISDICTION

The Eleventh Circuit entered judgment on August 18, 1995. (App. 1a). Petitioner's petition for rehearing and rehearing *en banc* was denied on October 18, 1995. (App. 6a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law . . . ."

STATEMENT

This case presents a fundamental question of criminal procedure on which the courts of appeals are divided: whether a defendant may be convicted simply because he has taken the stand and plausibly denied guilt.

1. Petitioner was indicted under 21 U.S.C. § 841 on one count of possession of cocaine with intent to distribute and under 21 U.S.C. § 846 on one count of conspiracy to possess cocaine. (App. 20a-21a). At petitioner's second trial,[1] the Government presented no evidence that the petitioner bought or sold narcotics. Instead, the evidence presented by the Government showed that Jose Pereira Garcia, petitioner's brother-in-law, was the subject of a "reverse sting operation" by Drug Enforcement Administration ("DEA") agents. 1 Trans. 93-94. After negotiating with Pereira, undercover agents agreed to deliver twenty kilograms of cocaine to him. On September 5, 1995, they placed the cocaine in a closed box in the rear of a government-owned Chevrolet Blazer, drove the Blazer to the shoe store operated by Pereira, and gave Pereira the keys. 1 Trans. 40-49, 89-95. The DEA agents planned to follow Pereira as he distributed the cocaine and identify the other individuals involved in his drug distribution operation. 1 Trans. 66.

Pereira, however, never took actual possession of the Blazer. Instead, petitioner — who was unknown to DEA and whom DEA agents did not recognize (1 Trans. 64-65, 73) — emerged from the shoe store, stepped into the Blazer, and drove it away. After

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[1] The first trial ended in a mistrial because the prosecutor improperly suggested to the jury that petitioner would testify. (App. 15a-19a). Unless otherwise noted, all references are to the second trial, which began on December 13, 1993.

petitioner turned left several blocks north of the shoe store, DEA agents concluded that he was fleeing. The seven or eight unmarked cars following petitioner converged, and petitioner was arrested. 1 Trans. 39-49, 88-101.

Although the Government failed to present any evidence that petitioner knew of the cocaine concealed in the Blazer and, indeed, established that petitioner did not have any opportunity to discover the cocaine, 1 Trans. 46, 73-74, 108, the district court denied petitioner's motion at the close of the Government's case for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. 2 Trans. 29.

2. Petitioner testified in his own defense. 2 Trans. 36. He stated that he did not know of the cocaine concealed in the Blazer.[2] 2 Trans. 98. Petitioner testified that on September 5, 1991 Pereira called and asked him to come to the shoe store. 2 Trans. 67. Petitioner assumed that Pereira wanted help with customers and put on a tie. 2 Trans. 67-68. At the store, without mentioning the contents of the Blazer, Pereira gave petitioner the keys and asked him to "take the car to the home." 2 Trans. 71-72. Petitioner went to the vehicle, drove it north toward his home, and then realized that Pereira may have wanted the Blazer delivered to Pereira's rather than petitioner's home. 2 Trans. 81-86. Petitioner then attempted to make a U-turn and return to the shoe store. However, due to rush hour traffic, he was forced to turn left into a residential area. 2 Trans. 89. Shortly thereafter, an unmarked vehicle forced petitioner off the road, and armed individuals whom petitioner later learned to be law enforcement officers arrested him. 2 Trans. 90-91, 101-03.

3. In rebuttal, the Government called Pereira, who by then had agreed to plead guilty and cooperate with the Government.

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[2] Petitioner also denied any knowledge that Pereira was involved in drug trafficking. Although petitioner suspected Pereira of some illegal activity — on several occasions in the spring of 1991 Pereira had asked petitioner to count large sums of money — petitioner thought his brother-in-law a thief, not a drug dealer. 2 Trans. 47-48, 53-57.

2 Trans. 182, 210-11. Pereira testified that he never told petitioner about his (Pereira's) drug trafficking and, in fact, tried to conceal that activity from petitioner by leading petitioner to believe that he was a thief. 2 Trans. 219-24. Pereira also stated that on September 5, 1991, after attempting to contact another relative, he asked petitioner to come to the shoe store. 2 Trans. 203. When petitioner arrived, Pereira gave him the keys to the Blazer and asked him to "park it outside the house." 2 Trans. 204. Finally, Pereira stated that neither he nor anyone else told petitioner of the cocaine in the Blazer. 2 Trans. 215-16, 220-21.[3] This testimony was uncontroverted.

4. At the close of the evidence, petitioner renewed his motion for acquittal. The trial judge found no evidence of an agreement and dismissed the conspiracy count. 3 Trans. 10. However, though the Government's own witnesses established that no one told petitioner about the cocaine concealed in the Blazer and that petitioner had no opportunity to discover the cocaine, the judge allowed the possession count to go to the jury. 3 Trans. 11-13. The jury found petitioner guilty of possession of cocaine with intent to distribute. 4 Trans. 6.

The trial judge was troubled by the lack of evidence supporting the verdict. In his view, petitioner's motion for acquittal on the possession count presented a "very close call," 3 Trans. 11, and before sentencing, the trial judge *sua sponte* ordered the parties to request a transcript of the trial so that he could once again review the evidence in the record. 5 Trans. 1-2. After sentencing petitioner to 121 months imprisonment, the minimum sentence in the applicable guideline range, the trial judge permitted

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[3] After Pereira's substantially similar testimony at the first trial, *see* Transcript, *United States v. Hernandez*, No. 91-670-Cr-DLG, at 65-134 (S.D. Fla. June 25, 1992), the Government moved to reduce Pereira's sentence below the applicable guideline range and statutory minimum based upon his "valuable assistance," (App. 22a), thereby attesting to the truthfulness of his testimony. *See* United States Sentencing Commission, *Guidelines Manual* § 5K1.1(a)(2) (1994).

petitioner to remain free on bond pending appeal based on exceptional circumstances, including that petitioner had raised a substantial legal question "likely to result in a reversal." (App. 10a).

5. The Eleventh Circuit found that t' ɔ affirmative evidence in the record — petitioner's possession of the Blazer containing the concealed cocaine, his counting of money for his brother-in-law, and his supposed attempt to flee law enforcement officers — supported the *inference* that petitioner knew of the cocaine. (App. 2a-3a). The court did not, however, suggest that this circumstantial evidence was by itself sufficient to prove beyond a reasonable doubt petitioner's knowledge of the cocaine. Instead, the Court found the evidence sufficient to support the jury's verdict when combined with petitioner's testimony denying such knowledge. (App. 2a).

In the Eleventh Circuit's view, "the jury was entitled to disbelieve [defendant's] testimony and believe that the opposite of his story was true." (App. 2a (citation omitted)). The court reasoned that

> "where some corroborative evidence of guilt exists for the charged offense . . . and the defendant takes the stand in his own defense, the defendant's testimony, denying guilt, may establish, by itself, elements of the offense." *United States v. Brown*, [53 F.3d 312 (11th Cir. 1995), *petition for cert. filed sub nom. Mullis v. United States*, 64 U.S.L.W. 3333 (U.S. Nov. 7, 1995) (No. 95-693)].

(App. 2a.) In *Brown*, the Eleventh Circuit held that, after viewing a defendant's demeanor on the stand, a jury is entitled to find the opposite of what the defendant testified and therefore able to convict any defendant who takes the stand and denies guilt. *See Brown*, 53 F.3d at 314-15. Issuance of the mandate was stayed pending resolution of this petition. (App. 4a).

ARGUMENT

This case raises a fundamental question of criminal procedure: whether a conviction that is not otherwise supported by sufficient

evidence may be sustained on the ground that the defendant testified and denied guilt. The Eleventh Circuit's answer was yes so long as the Government presents some corroborative evidence of guilt. In other words, in the Eleventh Circuit's view, in virtually every case the Government is likely to bring, a defendant's testimony *denying* guilt constitutes sufficient affirmative evidence to uphold a conviction. This sweeping rule conflicts with decisions of this Court and with decisions of at least five other circuits. It also undermines a key procedural safeguard designed to prevent unjust and erroneous convictions in the very cases where that safeguard is most needed. Accordingly, this case merits review.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF AT LEAST FIVE OTHER COURTS OF APPEALS.

The lower courts are divided over the proper weight to attach to a defendant's testimony denying guilt in assessing the sufficiency of the evidence in criminal cases. *See Stallings v. Tansy*, 28 F.3d 1018, 1023-24 (10th Cir. 1994) (noting disagreement among the circuits). Two courts of appeals — the Seventh Circuit and now the Eleventh Circuit — have held that a defendant's testimony denying guilt, by itself, is sufficient to establish the elements of an offense. *See United States v. Brown*, 53 F.3d 312 (11th Cir. 1995), *petition for cert. filed sub. nom. Mullis v. United States*, 640 U.S.L.W. 3333 (U.S. Nov. 7, 1995) (No. 95-693); *United States v. Zafiro*, 945 F.2d 881 (7th Cir. 1991), *aff'd on other grounds*, 113 S. Ct. 933 (1993). At least five other courts of appeals have taken a contrary position and held that such evidence is generally insufficient to sustain a criminal conviction. *See United States v. Aulicino*, 44 F.3d 1102, 1114 (2d Cir. 1995); *Stallings v. Tansy*, 28 F.3d at 1023-24; *United States v. Zeigler*, 994 F.2d 845, 849-50 (D.C. Cir. 1993); *United States v. Slone*, 601 F.2d 800, 804 (1979); *United States v. Pechenik*, 236 F.2d 844, 847 (3d Cir. 1956).

1. The D.C. Circuit recently considered whether a conviction may be sustained, in a case where the proof was

otherwise insufficient, simply because the defendant testified at trial. In *United States v. Zeigler*, 994 F.2d at 848, the Government suggested that the court look beyond the defendant's literal testimony and find in her denial of guilt sufficient evidence to sustain her conviction. Writing for the court, Judge Randolph recognized that a witness' demeanor is part of the evidence before the jury and that under certain circumstances demeanor evidence may lead a reasonable jury to assume the opposite of what a defendant testifies. *See id.* at 848-49. He concluded, however, that because demeanor evidence cannot be reviewed by an appellate court, reliance upon such evidence is incompatible with appellate review:

> Demeanor evidence is not captured by the transcript; when the witness steps down, it is gone forever. An appellate court cannot evaluate it, and therefore cannot determine how a rational juror might have treated it.
>
> * * *
>
> Because we cannot evaluate demeanor, a decision along the lines the government proposes would mean that in cases in which defendants testify, the evidence invariably would be sufficient to sustain the conviction. We would in each such case assume the jury correctly evaluated the evidence. In explaining how this could be so in light of the defects in the government's proof, we would reason backwards to the only explanation available — the defendant's demeanor. This sort of approach, beginning with the hypothesis that the jury must have gotten things right, contradicts the reason why appellate courts review convictions for sufficiency of evidence — that juries sometimes get things wrong. *Jackson v. Virginia*, 443 U.S. [307, 317 (1979).]

Id. at 849. Recognizing that "[a]ppellate review of the sufficiency of evidence protects against wrongful convictions," the D.C. Circuit refused to "destroy the protection in cases in which defendants testify." *Id.* at 850.

In reaching this conclusion, the D.C. Circuit rejected the very rule applied by the Eleventh Circuit in the decision below — that "when the government has presented at least *some* evidence of guilt, an appellate court may add negative inferences from the defendant's testimony to sustain the conviction." *Zeigler*, 994 F.2d at 849-50. The D.C. Circuit rejected this rule because the court could find "no principled way of deciding when the Government's proof, less than enough to sustain the conviction, is nevertheless enough to allow adding negative inferences from the defendant's testimony to fill the gaps." *Id.* at 850. For similar reasons, the D.C. Circuit also refused to "subscribe to the Seventh Circuit's analysis in *United States v. Zafiro*, 945 F.2d 881." *Id.*

The D.C. Circuit's decision in *Zeigler* drew heavily upon "Judge Learned Hand's famous *Dyer v. MacDougall* opinion (201 F.2d 265, 268-69 (2d Cir. 1952))." *Zeigler*, 994 F.2d at 848-49. Although *Dyer* was a civil case, the Second Circuit has extended its holding to criminal cases as well. *See, e.g., United States v. Aulicino*, 44 F.3d at 1114-15; *United States v. Sliker*, 751 F.2d 477, 495 n.11 (2d Cir. 1984), *cert. denied sub nom. Buchwald v. United States*, 470 U.S. 1058 (1985); *United States v. Marchand*, 564 F.2d 983, 986 (2d Cir. 1977) (Friendly, J.), *cert. denied*, 434 U.S. 1015 (1978). For example, in *Aulicino*, the Government argued that the defendant's challenge to the sufficiency of the evidence against him was barred by his decision to testify at trial. The Second Circuit acknowledged that a defendant's testimony "may . . . add weight to the government's case" and in particular that a jury may use its disbelief of a defendant's testimony to supplement other evidence against that defendant. *Aulicino*, 44 F.3d at 1114. Nevertheless, the Second Circuit reaffirmed that "a verdict of guilty cannot properly be based solely on the defendant's denial of the charges and the jury's disbelief of his testimony." *Id.* at 1114-15.

Three other circuits have joined the Second and D.C. Circuits in refusing to uphold criminal convictions based upon the mere fact that the defendant testified denying guilt. In *Stallings v. Tansy*, 28 F.3d at 1023, the Tenth Circuit rejected the

Government's suggestion that the jury could have inferred that the habeas corpus petitioner there knew that he possessed stolen goods from disbelief of his testimony. In the Tenth Circuit's view, "The jury's disbelief of petitioner's testimony could not fill the gap left by the State's total lack of relevant evidence as to petitioner's guilty knowledge." *Id.* at 1024. The Third and Fifth Circuits have reached similar conclusions. *See United States v. Slone*, 601 F.2d at 804 ("While the jury was within its right to disbelieve the defendant's account, such disbelief, standing alone, is inadequate to meet the government's affirmative obligation to produce evidence to support each element of the charge."); *United States v. Pechenik*, 236 F.2d at 847 ("[D]isbelief does not supply proof that the defendant participated in, directed or knew that the books were kept incorrectly.") (citation omitted).

2. In contrast to the five circuits holding that disbelief of a defendant, standing alone, is not a sufficient basis on which to sustain a criminal conviction, two courts of appeals hold that criminal convictions may, as a general rule, be sustained on the basis of disbelief of a defendant's testimony. *See Brown*, 53 F.2d 312; *United States v. Zafiro*, 945 F.2d 881.

In *United States v. Zafiro*, 945 F.2d 881 (Posner, J.), the Seventh Circuit declined to consider whether the evidence presented by the Government was sufficient to sustain a criminal conviction. Instead, the court noted that the defendant had testified and held that "on the basis of her demeanor" and the otherwise insufficient evidence in that case the jury was entitled to convict her. *See* 945 F.2d at 888. In so doing, the Seventh Circuit noted the concern expressed by the D.C. and Second Circuits that appellate courts are unable to review meaningfully verdicts based upon demeanor evidence. *See id.* (discussing *Dyer v. MacDougall*, 201 F.2d 265, and *United States v. Jenkins*, 928 F.2d 1175, 1179 (D.C. Cir. 1991)). Writing for the Seventh Circuit, then-Judge and now-Chief Judge Posner dismissed these concerns because, in his view, "if there is no evidence of guilt" other than a defendant's testimony denying guilt, the defendant would be entitled to a directed verdict at the end of the Government's case and would therefore have no reason to testify.

Id. The court did not, however, explain why where there is some, though insufficient, evidence of guilt and the district court erroneously refuses to direct acquittal at the close of the government's case, a jury should be permitted to convict a defendant based upon unreviewable demeanor evidence.

The decision below treated the sufficiency of disbelief of a defendant's testimony in similarly abbreviated fashion. The Eleventh Circuit simply asserted that where some evidence of guilt exists, "the defendant's testimony denying guilt, may establish, by itself, elements of the offense." (App. 2a (quotation omitted)). The Eleventh Circuit did not offer any principled justification for this assertion. The decision in *United States v. Brown*, 53 F.3d 312, upon which the court below relied, is equally cryptic. It asserts that, based upon the defendant's demeanor, a jury is entitled to find the opposite of what the defendant testified. *See Brown*, 53 F.3d at 314. The *Brown* opinion does not, however, attempt to distinguish *Zeigler*, *Dyer*, or any other decisions holding that mere disbelief of a defendant's testimony is not a sufficient basis for a judgment.[4]

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

In *Nishikawa v. Dulles*, 356 U.S. 129 (1958), this Court reviewed the sufficiency of the evidence in a denaturalization

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[4] In addition, the Ninth Circuit has asserted — albeit in a case in which the evidence presented by the Government was sufficient to support a conviction — "that [w]hen the defendant elects to testify, he runs the risk that if disbelieved, the trier of fact may conclude the opposite of his testimony is the truth." *United States v. Kenny*, 645 F.2d 1323, 1346 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981). *But see United States v. Chase*, 503 F.2d 571, 573 n.4 (9th Cir. 1974) (A defendant's denials of guilt "could not be used to support a finding of fact where, for example, the only basis for drawing the opposite inference was demeanor."), *cert. denied*, 420 U.S. 948 (1975); *United States v. Cisneros*, 448 F.2d 298, 306 n.10 (9th Cir. 1971) (same).

proceeding. The defendant in that case, an American citizen of Japanese descent, testified that he was trapped in Japan before World War II, drafted after the war began, and coerced into joining the Japanese Air Force. The trial judge found based upon his disbelief of defendant's testimony that the defendant had voluntarily entered the Japanese armed forces and thereby abandoned his United States citizenship. *See Nishikawa*, 356 U.S. at 132-33. This Court reversed. In its view, the trial judge's "disbelief of petitioner's story of his motives and fears" could not "fill the evidentiary gap in the Government's case." *Id.* at 137.

Nishikawa reflects a long line of decisions by this Court. More than a hundred years ago, this Court held that "disbelief of [a witness'] testimony could not supply a want of proof." *Bunt v. Sierra Butte Gold Min. Co.*, 138 U.S. 483, 485 (1891). Since that time, the Supreme Court has repeatedly reaffirmed this rule.[5] *See, e.g., Anderson v. Liberty Lobby*, 477 U.S. 242, 256-57 (1986) ("[D]iscredited testimony is not normally considered a sufficient basis for drawing a contrary conclusion.") (quotation omitted); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984) ("Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.") (citation omitted); *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 576 (1951) ("[D]isbelief of the engineer's testimony would not supply a want of proof.").

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[5] This Court has, however, recognized several exceptions to the rule that a judgment may not be sustained based upon disbelief of a witness' testimony. *See, e.g., St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2748 (1993) (failure to offer true reasons for employment decision supports inference that the actual reason is impermissible); *Wright v. West*, 505 U.S. 277, 296 (1992) (opinion of Thomas, J.) (treating inherently implausible and internally contradictory testimony as "affirmative evidence of guilt") (citation omitted). The court below did not suggest that any exception was applicable here.

The decision below rejected this rule and held as a general matter that a jury may find a defendant guilty beyond a reasonable doubt based upon disbelief of the defendant's testimony denying guilt. (App. 2a-3a). This ruling directly conflicts with *Nishikawa* and other decisions of this Court.

III. THE DECISION BELOW WAS ERRONEOUS.

The testimony of the Government's witnesses affirmatively established that petitioner was not told of and did not discover the cocaine DEA agents concealed in the Blazer. *See supra* pp. 2-4. Nevertheless, the Eleventh Circuit upheld the judgment below based upon petitioner's testimony that he did not know of the cocaine. (App. 2a-3a). The court did so by applying a rule of sweeping generality: that anytime there is "some corroborative evidence of guilt," a defendant's testimony denying guilt, by itself, supplies sufficient evidence of guilt to sustain a conviction. (App. 2a (quotation omitted)). This rule is irrational, unjustified, and violative of Due Process.

The decision below departs radically from traditional practice. Courts have not traditionally refused to scrutinize the sufficiency of the evidence in the record simply because a criminal defendant has testified. To the contrary, the traditional rule — exemplified in Judge Hand's decision in *Dyer v. MacDougall* — is that disbelief of a witness' or defendant's testimony, standing alone, is not sufficient to sustain a judgment. *See, e.g., Dyer v. MacDougall*, 201 F.2d at 268-69.[6] Traditional practice, of

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[6] *See also* 2 J. Wigmore, *Evidence* § 278, at 133 n.1 (J. Chadbourne rev. ed. 1979) ("A negative inference from disbelief of a party's testimony is not acceptable, though it may be theoretically sound.") (citation omitted); 9A C. Wright & A. Miller, *Federal Practice & Procedure*, § 2527, at 288 (2d ed. 1995) ("The party with the burden of proof does not make an issue for the jury's determination by relying on the hope that the jury will not trust the reliability of the witnesses."); Morgan, *Admissions*, 12 Wash. L. Rev. 181, 185-86 (1937) (observing that even in civil cases "mere disbelief of a party's evidence will not of itself sustain a finding of fact to the contrary"); Wellborn, *Demeanor*,

course, "provides the touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2339 (1994) (citations omitted); *see In re Winship*, 397 U.S. 358, 361-62 (1970). Accordingly, the Eleventh Circuit's departure from traditional practice "raises a presumption that its procedures violate the Due Process Clause." *Honda Motor Co. v. Oberg*, 114 S. Ct. at 2339.

The decision below does not offer any principled basis for departing from traditional appellate practice. Moreover, the justification offered in the decision upon which it primarily relies, *United States v. Brown*, is inadequate. In *Brown*, the Eleventh Circuit held that a defendant's testimony denying guilt is sufficient to sustain a criminal conviction because a jury, upon seeing a defendant's demeanor, is "entitled to believe [the defendant's] testimony and, in fact, to believe the opposite of what [the defendant] said." 53 F.3d at 314-15. The D.C. Circuit's critique of this reasoning is persuasive. Because demeanor evidence is not reflected in the appellate record, an appellate court cannot find demeanor evidence sufficient — or even probative — without first assuming that the jury correctly and rationally evaluated that evidence. *United States v. Zeigler*, 994 F.2d at 849. Such an assumption is, however, impermissible because it "contradicts the reason why appellate courts review convictions for sufficiency of evidence — that juries sometimes get things wrong." *Id.* at 849 (citation omitted); *see generally Jackson v. Virginia*, 443 U.S. 307 (1979).[7]

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76 Cornell L. Rev. 1075, 1101 & n.127 (1991) (observing that "cases citing this doctrine appear to be ubiquitous.")

[7] In addition, reliance on demeanor evidence is questionable in light of recent psychological studies. "Taken as a whole, the experimental evidence indicates that ordinary observers do not benefit from the opportunity to observe nonverbal behavior in judging whether someone is lying." Wellborn, *Demeanor*, 76 Cornell L. Rev. at 1088; *see also* Uviller, *Credence, Character and the Rules of Evidence*, 42 Duke L. J. 776, 787 (1993) ("[C]onsiderable data strongly suggest that the common faith in the telltale signs of prevarication is baseless.").

Nor can the decision below be salvaged by assuming that the jury disbelieved the petitioner because of inconsistent testimony or evidence other than demeanor. First, the Eleventh Circuit did not, and could not, find petitioner's testimony internally contradictory or inherently implausible. *See, e.g., Wright v. West*, 505 U.S. at 296 (opinion of Thomas, J.). Petitioner's testimony — that Pereira asked him to drive the Blazer in which the cocaine was concealed and that he did so without suspecting it contained cocaine or discovering the cocaine — was not only plausible; it was corroborated by the agents surveilling the Blazer and by government witness Pereira, the only witness who spoke with petitioner before he entered the Blazer. *See supra* pp. 2-4.

Second, even where a jury has a reasonable basis for finding that a defendant has fabricated testimony, that finding has only "modest probative value." *McCormick on Evidence* § 273, at 809 (3d ed. 1984). Fabrication of evidence indicates a party's "consciousness that his case is a weak or unfounded one." 2 Wigmore, *Evidence* § 278, at 133. While such consciousness is often associated with and therefore tends to show guilt, its probative value is limited because "an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs." *Id.* § 278, at 135 (quotation omitted); *see generally* J. Gorelick, S. Marzen & L. Solum, *Destruction of Evidence* § 2.3, at 34-35 (1989).[8] Accordingly, courts and commentators have concluded that fabrication of evidence, like other conduct obstructing trial, "will not supply a want of proof of a particular fact essential to the proponent's case." *McCormick on Evidence* § 273, at 810 (footnote omitted); *see also id.* at 810 n.20 (citing

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[8] For example, here, even if the jury had credited the testimony of law enforcement agents that petitioner fled from their unmarked cars and concluded that petitioner fabricated his testimony to the contrary, *see supra* pp. 3, that conclusion would have only limited probative value for the simple reason that an innocent person would have had just as much reason to deny fleeing as a guilty one.

cases); J. Gorelick, S. Marzen & L. Solum, *Destruction of Evidence* § 2.18, at 50-51 nn. 104-105 (same).

Finally, the rule applied in the decision below is fundamentally unfair. The rule significantly increases the risk of erroneous and unjust convictions. It applies to the cases in which it is most likely that an innocent person will be found guilty; those in which the evidence presented by the Government is insufficient to sustain a conviction.[9] By stripping defendants who testify in such cases of sufficiency review, the primary safeguard against irrational and improper verdicts, the decision below virtually ensures that more innocent persons will be erroneously and unjustly convicted. The decision below impermissibly burdens the right of criminal defendants to testify on their own behalf. Although the Constitution guarantees defendants that right, *see e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 49 (1987), the decision below in effect requires defendants who exercise that right to waive their constitutional right to have the government prove all elements of the offense charged beyond a reasonable doubt. Imposing such a penalty upon the exercise of a constitutional right is impermissible because it "cuts down on the privilege by making its assertion costly." *Griffin v. California*, 380 U.S. 609, 614 (1965).

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[9] This is not to say that the *logic* of the opinion below applies only to this narrow range of cases. Quite the opposite is true. By the logic of the decision below, a jury should be able to convict a defendant based upon exculpatory testimony from any witness. Moreover, if disbelief of a witness, standing alone, is sufficient to establish the opposite of the witness' testimony in the criminal context, disbelief of a witness must be sufficient to sustain judgment in the civil context where a more lenient standard of proof is applied — a chain of logic that leads inevitably to the absurd conclusion that a civil litigant can avoid summary judgment simply by pointing to witnesses who deny the material elements of that party's case. *Cf. Dyer v. MacDougall*, 201 F.2d at 268-69.

IV. THIS CASE PRESENTS AN IMPORTANT AND RECURRING ISSUE.

As the many cases and commentators addressing this issue demonstrate, *see supra* pp. 6-10, 12 n.6 questions concerning the weight and sufficiency of negative inferences based upon disbelief of a defendant's or witness' testimony arise frequently. Indeed, the Eleventh Circuit has addressed this issue at least three times in the last six months. *See United States v. Vasquez*, 53 F.3d 1216, 1225-26 (11th Cir. 1995); App. 2a-3a; *United States v. Brown*, 53 F.3d at 314-15. Moreover, the question presented by this case is of indisputable significance. The answer to this fundamental question of criminal procedure will not only determine the validity of many past judgments. It will also influence whether defendants in future trials risk testifying. The question presented by this case is therefore both important and recurring.[10]

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[10] The question presented in this case is similar to the first question presented in a petition currently pending before this Court. *See* Petition for Certiorari at 4-7, *Mullis v. United States*, 64 U.S.L.W. 3333 (U.S. Nov. 7, 1995) (No. 95-693). Although the *Mullis* petition seeks review of the Eleventh Circuit's decision in *Brown*, this petition presents a better vehicle for considering the Eleventh Circuit's blanket rule that disbelief of a defendant's testimony is sufficient to sustain in criminal conviction. First, in the *Mullis* case, the Eleventh Circuit specifically noted that "[t]he government's evidence was possibly enough to prove guilt beyond a reasonable doubt." *Brown*, 53 F.3d at 314. There was no such suggestion here. Second, the petition for certiorari in *Brown* failed to apprise this Court of either the conflict between the Eleventh Circuit's rule and this Court's decisions or the true depth of the conflict among the circuits. *Compare* Petition for Certiorari at 4-7, *Mullis v. United States with infra* pp. 6-10.

If, however, this Court grants the *Mullis* petition on the first question presented in that case, petitioner respectfully requests that the Court grant certiorari in this case and consolidate it with *Mullis*. In the alternative, petitioner requests that the Court hold this case pending any decision in the *Mullis* case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

December 1, 1995

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4247

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CEASAR HERNANDEZ,
Defendant-Appellant.

D.C. Docket No. 91-670 CR-DLG
(August 18, 1995)

Appeal from the United States District Court
for the Southern District of Florida

Before KRAVITCH, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

Caesar Hernandez appeals his conviction for possession of cocaine with intent to distribute. Hernandez asserts that the evidence was insufficient to sustain his conviction.*

To sustain a conviction for possession with intent to distribute, the government must show that Hernandez (1) knowingly (2) possessed cocaine (3) with intent to distribute. 21 U.S.C. § 841(a)(1). At trial, Hernandez' defense rested on his lack of

* Hernandez also argues that the prosecutor committed misconduct in closing argument and that the district court committed reversible error in its response to a question posed by the jury. We affirm without discussion Hernandez' conviction on these issues.

knowledge that there was cocaine in the Chevrolet Blazer that he was driving when he was arrested.

The government presented evidence supporting the inference of Hernandez' knowledge. Specifically, one government witness, Jose Lucio Pereira-Garcia (Pereira), testifying pursuant to a cooperation agreement, testified that Hernandez helped Pereira count money on several occasions. The aggregate amount of money counted was up to $1.5 million to $2 million. Pereira testified that he never paid Hernandez for doing a drug deal and that Hernandez did not know that Pereira was involved in narcotics trafficking.

When Hernandez was arrested he was the driver and sole occupant of a Chevrolet Blazer which had 20 kilograms of cocaine in it. The cocaine was put there as part of a reverse sting operation by the DEA. Pereira had called Hernandez and asked him to come get the Blazer and to drive it to his house. Pereira testified that he did not tell Hernandez that cocaine was in the Blazer.

Hernandez led agents in unmarked cars on a short, high speed chase through a residential neighborhood before he was stopped and arrested. Hernandez testified he did not see the blue lights or hear the sirens; so, he was not trying to flee from the agents. But, as this court has said, the jury was entitled to disbelieve Hernandez' testimony and believe that the opposite of his story was true. *United States v. Sharif*, 893 F.2d 1212, 1214 (11th Cir. 1990). And, "where some corroborative evidence of guilt exists for the charged offense . . . and the defendant takes the stand in his own defense, the defendant's testimony, denying guilt, may establish, by itself, elements of the offense." *United States v. Brown*, Slip Op. No. 93-8181, p. 2127 (11th Cir. 1995).

The evidence established that Hernandez was in sole possession of 20 kilograms of cocaine (having a retail value of $2 million), that on numerous occasions Hernandez counted large amounts of money with Pereira, and that Hernandez attempted to elude law enforcement agents. Given this evidence and Hernandez' testimony, which the jury was free to disbelieve, we

cannot say that reasonable jury could not find Hernandez guilty. The evidence is sufficient to sustain Hernandez' conviction.

AFFIRMED.

[Filed Nov. 6, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4247

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CEASAR HERNANDEZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ORDER:

( ) The motion of *Ceasar Hernandez* for (XX) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(XX) The motion of *Ceasar Hernandez* for (XX) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including *1 December 1995*, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

[Filed October 18, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4247

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CAESER HERNANDEZ,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19___, ____F.2d____).

Before: KRAVITCH, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CESAR HERNANDEZ,

Defendant.

Case No. 91-0670-CR-GRAHAM

ORDER AND MEMORANDUM OPINION

THIS CAUSE came before the Court upon Defendant, Cesar Hernandez's ("Hernandez") Motion for Continued Bond Pending Appeal.

I. BACKGROUND

The Grand Jury charged Hernandez with a two count indictment. Count I charged Hernandez with conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846. Count II charged Hernandez with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). On September 10, 1991, Hernandez was released on a $25,000 Corporate Surety bond and a $100,000 Personal Surety Bond.[1]

On December 15, 1993, following the close of evidence, this Court granted Hernandez's Rule 29 motion to dismiss Count I of the indictment for the Government's failure to meet its burden of proof. On December 16, 1993, a jury found Hernandez guilty of intent to distribute 20 kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1). On April 20, 1994, this Court sentenced

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[1] On July 20, 1993, Magistrate Judge Linnea R. Johnson modified Hernandez's bond to release Lucille M. Pereira as a surety and reset a $150,000 Personal Surety Bond co-signed by Hernandez's wife.

Hernandez to 10 years imprisonment. Hernandez seeks to remain on bond pending appeal of his conviction.

II. DISCUSSION

Generally, a defendant may be released on bail pending appeal if the Court finds that the defendant does not pose a risk of flight or a danger to the community and that the appeal raises a substantial question of law or fact and is not interposed for the purposes of delay. 18 U.S.C. § 3143(b)(1). However, the Bail Reform Act of 1990 added another provision to section 3143 which mandates detention for persons convicted of crimes enumerated in § 3142(f)(1)(A), (B), and (C).[2] 18 U.S.C. § 3143(b)(2). The Bail Reform Act also added, however, a provision which provides that a person subject to mandatory detention under section 3143(b)(2) would be eligible for bail under section 3143(b)(1) if the judicial officer involved finds that it has been "clearly shown" that "there are exceptional reasons why such person's detention would not be appropriate." 18 U.S.C. § 3145(c). Therefore, a defendant convicted of a crime enumerated in section 3142(f)(1)(A), (B), and (C) can be released on bail pending appeal if the Court finds the following:

1) that the defendant does not pose a risk of flight or a danger to the community;

---

[2] Section 3142(f)(1) states, in pertinent part:

> (1) upon motion of the attorney for the Government, in a case that involves--
>
> (A) a crime of violence;
>
> (B) an offense for which the maximum sentence is life imprisonment or death;
>
> (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et. seq.), the Controlled Substance Import and Export act (21 U.S.C. 951 et seq.), or in the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.) . . .

2) that the defendant's appeal raises a substantial question of law or fact; and

3) that exceptional reasons clearly exists that make detention inappropriate.

United States v. Pope, 794 F. Supp. 372 (S.D. Fla. 1992), *aff'd*, 993 F.2d 1533 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 279, 702 (1994). After holding two evidentiary hearings, this Court finds that Hernandez has met his burden of satisfying all three criteria necessary to warrant his continued release.

A. Risk of Flight or Danger to the Community

Hernandez has been on bond for 2 1/2 years. He has done everything the Court has asked of him and has complied with all the terms and conditions of his release. Moreover, on May 10, 1994, a United States Pretrial Services Officer issued a Release Status Report which states "[b]ased on the defendant's performance while on pretrial release, it is felt that the defendant is not likely to flee or pose a danger to the community." Accordingly, the Court finds that Hernandez does not pose a flight risk. 18 U.S.C. § 3143(b)(1)(A). However, based upon statements made by Hernandez's estranged wife, the Court was initially concerned whether Hernandez posed a danger to the community. However, after hearing evidence presented at two evidentiary hearings, this Court is convinced by a preponderance of the evidence that Hernandez does not pose a danger to the community.

B. Substantial Question of Law of Fact

The Eleventh Circuit has held that a "substantial question" is more than a showing that the appeal is not frivolous. It is a "close" question or one that very well could be decided the other way. *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985). Having heard the evidence presented at trial, this Court finds that it is a "close" call as to whether the government had met its burden of proof as the critical elements of the charge in Count II of the indictment. Accordingly, this Court finds that Hernandez

has raised a substantial question of law or fact likely to result in a reversal, or order for a new trial, or a sentence that does not include a term of imprisonment. 18 U.S.C. § 3143(b)(1)(B).

C. Exceptional Reasons

The third point to consider is whether or not "exceptional reasons" clearly exist to make detention inappropriate. The Second Circuit in *United States v. DiSomma*, 951 F.2d 494 (2d Cir. 1991), provides a careful analysis of section 3145(c). In analyzing section 3145(c), the Second Circuit, found the language of the statute, case law, and legislative history unhelpful in determining what Congress meant by "exceptional reasons." Therefore, the Court was forced to make its own interpretation of the statute. In doing so, the Court stated:

> We do think that an unusual legal or factual question can be sufficient . . . to meet the test. On the other hand, a merely substantial question may be sufficient, in the presence of one or more remarkable and uncommon factors, to support a finding of exceptional reasons for the inappropriateness of detention. As in many things, a case by case evaluation is essential, and it is not our intention to foreclose district judges from the full exercise of discretion in these matters.

DiSomma, 951 F.2d at 497. The Second Circuit went on to hold that where a defendant mounts a direct and substantial challenge on appeal to the factual underpinnings of the element of the crime upon which his sole conviction stands or falls, in the absence of risk of flight or danger to the community, it is well within the district judge's discretion to find that exceptional reasons allow release of the defendant pending appeal. *Id.* at 498.

In the intent case, Hernandez is mounting a direct and substantial challenge on appeal to the factual underpinnings of the elements of the crime upon which his sole conviction stands or falls. Hernandez contends that the evidence does not support the knowledge and intent elements of the offence charged in Count II of the indictment. In fact, there was evidence presented at trial

in which Hernandez's brother-in-law, the main organizer and precipitator of the charged offense, testified that Hernandez was not aware that his "Ford Blazer" contained cocaine. Moreover, the Court has found that Hernandez poses no risk of flight and no danger to the community and has presented a substantial question on appeal. Accordingly, this Court finds that exceptional reasons clearly exists which makes mandatory detention inappropriate in this case.

III. CONCLUSION

Based on the foregoing discussion, the Court holds that Hernandez has met his burden of satisfying all three criteria for continued release on bail pending his appeal. Accordingly, Hernandez' motion for Continued Bond Pending Appeal is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 3rd day of June, 1994.

/s/ Donald L. Graham
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

v.

CEASAR HERNANDEZ

Reg. No. 45927-004	Chris Clark, Assistant U.S. Attorney
a/k/a Oscar Cabrera	Jerry Schreiber
(True Name)	19 West Flagler Street S-207
(Name of Defendant)	Miami, FL 33130, Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 91-670-CR-GRAHAM(02)

THE DEFENDANT:

[ ] pleaded guilty to count(s)_____

[X] was found guilty on count(s) II of the Indictment after a plea of not guilty.

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section:	21 U.S.C. § 841(a)(1) & 18 U.S.C. 2
Nature of Offense:	Possession with Intent to Distribute Cocaine
Date Offense Concluded:	9/5/91
Count Number(s):	II

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s)_____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) II of the Indictment, which shall be due [x] immediately [] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 262-63-9882

Defendant's Date of Birth: 2-3-63

Defendant's Mailing Address:
5430 S.W. 93 Avenue
Miami, FL 33165
(305) 261-1366

Defendant's Residence Address:
_____
_____

4-19-94
Date of Imposition of Sentence

/s/ Donald L. Graham
Signature of Judicial Officer

Donald L. Graham
U.S. District Judge
Name & Title of Judicial Officer

4-28-94
Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CAESAR HERNANDEZ,

Defendant.

CASE NO. 91-670-CR-GRAHAM

ORDER DENYING MOTION FOR NEW TRIAL AND JUDGMENT OF ACQUITTAL

THIS CAUSE came before the Court upon the Defendant's Motion for Judgment Acquittal or in the Alternative a New Trial. The Court having reviewed the issues at hand and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that Defendant's Motion for Judgment of Acquittal or in the Alternative for a New Trial is Denied.

DONE AND ORDERED in Chambers, at Miami, Florida this 31st, day of January, 1994.

/s/ Donald L. Graham
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

Plaintiff,

v.

CESAR HERNANDEZ

Defendant.

Case No. 91-670-CR-GRAHAM

MEMORANDUM OPINION AND ORDER

THIS CAUSE came before the Court upon the Government's Motion for Reconsideration.

I. BACKGROUND

Defendant, Cesar Hernandez ("Defendant"), along with codefendant Jose Pereira-Garcia ("Pereira"), was charged in a two-count indictment with conspiracy and possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 846 and 841(a)(1).

At Defendant's trial, the defense called Pereira as a witness. During Pereira's cross-examination, the prosecutor, in the midst of questioning the witness about whether Defendant had ever received money for helping the witness hide money or deliver cocaine, asked the following question: "As he will tell us later, he never got a promised fee for driving the cocaine away from your shoe store on September 5, '89?". Transcript of Testimony Excerpt of Jose Pereira-Garcia at 4. Defense counsel objected to the question and moved for mistrial on the basis that the prosecutor's question implied Defendant must take the stand. The motion for mistrial was denied and the Court gave a cautionary

instruction to the jury that Defendant had no obligation to produce testimony.[3]

At the close of its case, the defense moved for judgment of acquittal pursuant to Fed. R. Crim. P. 29(a), which the court denied. However, the court advised counsel that it would allow the case to go to the jury, but if Defendant were found guilty, then Defendant's motion for mistrial would be granted based upon the circumstantial nature of the case. The jury returned a verdict of guilty and the court declared a mistrial. This motion for reconsideration followed.

II. DISCUSSION

A. Motion for Reconsideration

In *United States v. Vicaria*, 963 F.2d 1412 (11th Cir. 1992), the eleventh circuit found that while motions for reconsideration of district court orders in criminal cases are not expressly authorized by the Federal Rules of Criminal Procedure, the Supreme Court has held that timely filing of such motions tolls the time for filing notices of appeal and the time begins to run again following disposition of the motion. *Id.* at 1413-14, *citing United States v. Dieter*, 429 U.S. 6 (1976); *United States v. Healy*, 376 U.S. 75 (1964). The court went on to find that "a motion for reconsideration in a criminal case must be filed within

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[3] The cautionary instruction given to the jury was as follows:

> Ladies and gentlemen, there was a question asked by the prosecutor. The question was "As he will tell us later, he never got a promised fee for driving the cocaine away from your shoe store on September 5." If that "he" referred to Mr. Hernandez, as you have already been instructed, a defendant has no obligation whatsoever to present any testimony. That is the reason I sustained the objection, and you are to disregard any suggestion that question may convey. That is, that this defendant has to say something later, because he doesn't have to say anything, as I have told you previously, as I am telling you now, and if the circumstances suggest, I will tell you that later during the instruction phase. Trial Transcript at 7.

the period of time for filing a notice of appeal in order to extend the time for filing an appeal. (citation omitted). Therefore, in a criminal case, the government has thirty days in which to seek reconsideration of a final judgment or other appealable order." *Vicaria*, 963 F.2d at 1414.

Defendant argues that the Government's motion for reconsideration is procedurally improper. Relying on *Vicaria*, Defendant asserts that because this court granted a mistrial, not a new trial, the order is neither appealable nor a final judgment, and thus, the Government's motion for reconsideration is meritless. The Government counters that argument by asserting that the distinction between granting a mistrial or a new trial is purely semantic and does not govern in this case. This court agrees.

18 U.S.C. § 3731 allows the government to appeal in a criminal case "from a decision, judgment, or order of a district court dismissing an indictment or information granting a *new trial* after verdict or judgment . . ." (emphasis added). In the case at bar, the court entered an order granting Defendant's motion for mistrial after the jury returned a verdict of guilty. The effect of this order was to grant Defendant a new trial. Thus, this court will give its order granting mistrial its legal effect rather than be constrained by a label. *See United States v. Wilson*, 492 F.2d 1345 (3rd Circuit 1974), *rev'd on other grounds and remanded*, 420 U.S. 332 (1975). Since 18 U.S.C. § 3731 allows appeals from orders granting new trials and the Government filed its motion for reconsideration within the time period for filing a notice of appeal, the Government's motion for reconsideration is procedurally correct.

B. Motion for Mistrial

The test for determining whether there has been an impermissible comment upon a defendant's right not to testify at trial is "whether the statement was manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of an accused to testify." *United States v. Zielie*, 734 F.2d 1447, 1461, *cert. denied*, 469

U.S. 1189 (1985), *quoting United States v. Dearden*, 546 F.2d 622, 625 (5th Cir. 1977), *cert. denied*, 434 U.S. 902 (1977). When applying this standard, the court must look at the context in which the statement was made to determine the manifest intention of the speaker and its natural and necessary impact upon the jury. *United States v. Forrest*, 620 F.2d 446, 455 (5th Cir. 1980), *quoting Samuel v. United States*, 398 F.2d 964, 967 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969).

The Government argues that the prosecutor did not intend to comment on defendant's silence, but merely made a misstatement. The Government asserts that the question "As he will tell us later, he never got a promised fee for driving the cocaine away from your shoe store on September 5, '89?" does not support a finding of mistrial. The Government goes on to argue that even if this court were to find that the prosecutor impermissibly commented on Defendant's silence, this error was harmless. In support of its position, the government cites *United States v. Dorsey*, 819 F.2d 1055 (11th Cir. 1987), *cert. denied*, 486 U.S. 1025 (1988). During closing argument, the prosecutor in *Dorsey* referred to the defendant's testimony even though the defendant never testified. The court found that the prosecutor's comment was a "slip of the tongue" and harmless. *Id.* at 1061-62.

In the instant case, the rather pointed nature of the question implied that the Defendant would be testifying. While the prosecutor stated at sidebar that he did not intend to imply that Defendant would testify, the record as a whole is unclear as to the prosecutor's "manifest intent."

In any event, the court need not determine whether the prosecutor intended to comment upon Defendant's failure to testify since, under the facts of this case, the court finds that the jury would "necessarily and naturally" take this question as a comment on Defendant's failure to testify. Here, Pereira was a

cooperating individual[4] whose credibility was attested to by the Government. Pereira testified that Defendant had no knowledge of Pereira's involvement in any drug transactions - the only evidence which could have suggested Defendant's guilt. Indeed, the evidence presented by the Government against Defendant was so minimal that the court seriously considered granting Defendant's motion for judgment of acquittal pursuant to Fed. R. Crim. Proc. 29. Nonetheless, the court allowed the case to go to the jury for consideration.

Although Defendant had previously indicated he would testify, he did not. During Pereira's cross-examination, the prosecutor while attempting to attack Pereira's credibility, asked the question at issue here. Looking at the totality of the circumstances in this case, the court must conclude that the jury would necessarily view the question as an impermissible comment upon Defendant's failure to testify. Finally, because this case was based almost totally on circumstantial evidence, the court cannot conclude that the prosecutor's comment was harmless.

III. CONCLUSION

Based upon the foregoing discussion, the Government's Motion for Reconsideration is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 9th day of October, 1992.

/s/ Donald L. Graham
Donald L. Graham
UNITED STATES DISTRICT JUDGE

---

[4] Pereira entered a plea on both counts of the indictment in November 1991.

[Filed Sept. 11, 1991]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

v.

JOSE LUCIO PEREIRA-GARCIA,
a/k/a "Pepe",

and

CEASAR HERNANDEZ.

No. 91-0670 CR-RYSKAMP
21 USC 841(a)(1)
21 USC 846
18 USC 2

INDICTMENT

The Grand Jury charges that:

COUNT I

From on or about March 30, 1991, to on or about September 5, 1991, at Dade County, in the Southern District of Florida, and elsewhere, the defendants,

JOSE LUCIO PEREIRA-GARCIA,
a/k/a "Pepe",

and

CEASAR HERNANDEZ,

did knowingly and intentionally combine, conspire, confederate and agree with each other and with persons known and unknown to the Grand Jury to possess with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title

21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846.

COUNT II

On or about September 5, 1991, at Dade County, in the Southern District of Florida, and elsewhere, the defendants,

JOSE LUCIO PEREIRA-GARCIA,
a/k/a "Pepe",

and

CEASAR HERNANDEZ,

did knowingly and intentionally possess with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

A TRUE BILL

/s/ Jeremiah Smith
JEREMIAH SMITH
FOREPERSON

/s/Dexter W. Lehtinen
DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

v.

JOSE PEREIRA GARCIA,
a/k/a "Pepe",

Case No. 91-670-Cr-GRAHAM

UNDER SEAL

GOVERNMENT'S MOTION FOR SENTENCING DEPARTURE PURSUANT TO RULE §5K1.1 OF THE SENTENCING GUIDELINES

The United States of America, by and through its undersigned counsel, hereby moves this Honorable Court to depart from the sentencing guidelines applicable in this matter as provided in Rule § 5K1.1 of the Sentencing Guidelines, entitled "Substantial Assistance to Authorities," and in support thereof, states as follows:

1. On September 11, 1991, a two-count indictment was returned by the Federal Grand Jury charging defendant with conspiracy and possession with intent to distribute cocaine in violation of Title 21, United States Code, Sections 841 and 846.

2. On November 27, 1991, defendant entered into a plea agreement, whereby defendant agreed to plead guilty to both counts of the indictment. Defendant further agreed to cooperate with law enforcement authorities.

3. Defendant has provided valuable assistance to agents of the Drug Enforcement Administration, the United States Customs Service, and detectives of the Metro Dade Police Department, the substance of which will be explained to the Court at the time of sentencing.

WHEREFORE, for the above reasons, the United States requests that this Court depart from the applicable sentencing guidelines range, and sentence defendant Jose Pereira Garcia to a term of incarceration less than that prescribed by the sentencing guidelines. Also, the United States requests that this Motion and all pleadings pertaining thereto be sealed by this Court.

Respectfully submitted,

ROBERTO MARTINEZ
UNITED STATES ATTORNEY

By: /s/ Christopher J. Clark
CHRISTOPHER J. CLARK
ASSISTANT UNITED STATES ATTORNEY
FLORIDA BAR #588040
(305) 536-4833

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this 26th day of June, 1992 to Jose Martinez, Esq., counsel for defendant.

/s/ Christopher J. Clark
CHRISTOPHER J. CLARK
ASSISTANT UNITED STATES ATTORNEY

Supreme Court, U.S.
FILED
JUN 2 1996
CLERK

No. 95-857

In The

Supreme Court of the United States

October Term, 1995

CAESAR HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal conviction may be sustained based upon otherwise insufficient evidence simply because the defendant has taken the stand and affirmatively declared his innocence?

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This amicus brief is filed pursuant to Rule 37 of the United States Supreme Court. Both petitioner and respondent have granted amicus consent to file this brief, and the letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation which currently has a membership of more than 8,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Members of the NACDL have an ethical responsibility to provide criminal defendants with the effective assistance of counsel guaranteed under the Sixth Amendment. Members of the NACDL have a continuing duty to vigorously represent criminal defendants before the state and federal courts and stay informed of the development of the criminal law.

Among the NACDL's objectives is to insure the proper administration of criminal justice and to protect individual rights guaranteed by the Bill of Rights. Members of the NACDL have a vital interest in ensuring that

constitutional rights such as the right of an accused to testify at his/her criminal trial are exercised voluntarily, with an understanding of the legal implications of their exercise, and without any unconstitutional burdens upon the exercise of those rights. The Eleventh Circuit's rule – that a criminal defendant who testifies and asserts his innocence effectively waives his constitutional right to have the government prove all of the elements of the offense beyond a reasonable doubt – impermissibly burdens the defendant's right to testify and will have its greatest negative impact on the class of defendants most likely to testify: innocent ones.

REASON FOR GRANTING THE WRIT

This case raises a fundamental question of criminal procedure that has sharply divided the lower courts: whether a defendant's testimony *denying* guilt and asserting his innocence may, by itself, constitute sufficient evidence to support the jury's verdict of guilt beyond a reasonable doubt. The Eleventh Circuit's answer is yes so long as the government presents some (though insufficient) corroborative evidence of guilt. In other words, in the Eleventh Circuit's view, in virtually every case the government is likely to bring – *i.e.*, in those cases where there is at least some corroborative evidence – a defendant's testimony *denying* guilt constitutes sufficient affirmative evidence to uphold a conviction. This sweeping rule conflicts with decisions of this Court and with decisions of at least five other circuits. More importantly, it undermines the primary function of criminal appellate

review – to protect the innocent from wrongful conviction. Accordingly, this case merits review.[1]

SUMMARY OF ARGUMENT

Faced with insufficient evidence of petitioner's guilt, and uncontroverted evidence of his innocence as presented by the government, the Eleventh Circuit rejected the petitioner's challenge to the sufficiency of the evidence presented at trial because he took the stand and denied his guilt. According to the Eleventh Circuit's general rule, as announced in *United States v. Brown*, 53 F.3d 312 (11th Cir. 1995), *petition for cert. filed sub nom. Mullis v. United States*, 64 U.S.L.W. 3333 (U.S. Oct. 10, 1995) (Case No. 95-693), and applied in this case, when a criminal defendant testifies and *denies* his guilt, his testimony, by itself, may establish the elements of the offense for purposes of appellate review.

In addition to creating a direct conflict among the circuits, *see* Petition for Certiorari, at pp. 6-10, the rule applied by the Eleventh Circuit unconstitutionally penalizes a criminal defendant for testifying in his own defense. The Eleventh Circuit's rule also eliminates the government's burden of proving all elements of the offense beyond a reasonable doubt, in violation of the rights of a criminal defendant under the Due Process

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[1] A petition for certiorari, raising substantially the same issue as raised herein, is currently pending in another case originating in the Eleventh Circuit. *See Mullis v. United States*, 64 U.S.L.W. 3333 (U.S. Oct. 10, 1995) (Case No. 95-693).

Clause of the Fifth Amendment. This Court should grant certiorari to review this issue of great importance to the administration of justice.

ARGUMENT

THIS COURT SHOULD RESOLVE THE CONFLICT REGARDING WHETHER INSUFFICIENT EVIDENCE OF A DEFENDANT'S GUILT IS AUTOMATICALLY RENDERED SUFFICIENT SIMPLY BECAUSE THE DEFENDANT TOOK THE STAND AND DECLARED HIS INNOCENCE

The NACDL encourages review of a decision that undermines the primary function of appellate review and a basic goal of the criminal justice system: to protect the innocent from wrongful conviction. The Eleventh Circuit's decision in this case, which relied upon an earlier opinion by a divided panel of the Eleventh Circuit in *United States v. Brown*, 53 F.3d 312 (11th Cir. 1995), *petition for cert. filed sub nom. Mullis v. United States*, 64 U.S.L.W. 3333 (U.S. Oct. 10, 1995) (Case No. 95-693), effectively holds that when a defendant testifies and denies his guilt, and a jury thereafter finds him guilty, the defendant's testimony will *ipso facto* be viewed by the reviewing court as substantive evidence of his guilt. That is, where the government presents "some corroborative evidence of guilt" in its case-in-chief, *id.* at 314, and the defendant thereafter testifies and asserts his innocence to the charges, his challenge to the sufficiency of the evidence will be summarily rejected even if the government's evidence was otherwise insufficient.

This rule – that a jury's apparent disbelief of a criminal defendant's testimony invariably constitutes positive evidence of guilt – has been rejected by five other circuits. *See United States v. Aulicino*, 44 F.3d 1102, 1114-15 (2d Cir. 1995); *Stallings v. Tansy*, 28 F.3d 1018, 1023-24 (10th Cir. 1994); *United States v. Zeigler*, 994 F.2d 845, 849-50 (D.C. Cir. 1993); *United States v. Slone*, 601 F.2d 800, 804 (5th Cir. 1979); *United States v. Pechenik*, 236 F.2d 844, 847 (3d Cir. 1956); *but see United States v. Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991), *aff'd on other grounds*, 506 U.S. 534 (1993) (adopting rule applied by Eleventh Circuit). The rule has also been rejected by this Court in the context of a denaturalization case, *see Nishikawa v. Dulles*, 356 U.S. 129, 137 (1958) ("Nor can the district judge's disbelief of petitioner's story of his motives and fears fill the evidentiary gap in the Government's case."), and other civil cases as well. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984) ("Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.") (citation omitted); *Moore v. Chesapeake & O. Ry.*, 340 U.S. 573, 576 (1951) ("[D]isbelief of the engineer's testimony would not supply a want of proof.").

This Court should grant certiorari to reject the Eleventh (and Seventh) Circuit's rule. The rule is unconstitutional as applied to defendants in criminal cases, where the burden of proof on the plaintiff is more exacting and the consequence of an erroneous jury verdict is more tragic. First, the rule penalizes innocent and truthful defendants who exercise their fundamental constitutional right to testify, and impermissibly burdens that right by deterring future innocent defendants from testifying and

truthfully asserting their innocence. Second, the rule violates due process by allowing the jury to convict a defendant based on "negative inferences," thus eliminating the requirement that the government affirmatively prove all elements of an offense beyond a reasonable doubt.

A. Right To Testify

The right to testify is one of the rights that is "essential to due process of law in a fair adversary process." *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)). It is a fundamental constitutional right, which is found in the Compulsory Process Clause of the Sixth Amendment, the Due Process Clause of the Fifth Amendment, and as a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir.) (en banc), *cert. denied*, 113 S. Ct. 127 (1992); *United States v. Martinez*, 883 F.2d 750, 754 (9th Cir. 1989), *vac. on other grds.*, 928 F.2d 1470 (9th Cir.), *cert. denied*, 501 U.S. 1249 (1991); *see also Nix v. Whiteside*, 475 U.S. 157, 164 (1986).

The decision whether to testify arises in every criminal case. It often represents the single most important factor in a criminal case. *See* Anthony Amsterdam, *Trial Manual for the Defense of Criminal Cases*, sec. 390 (3d ed. 1974); Edward Bennett Williams, *The Trial of a Criminal Case*, 29 N.Y.St.B.A.Bull. 36, 42 (1957). Although the decision is personal to the accused, it is defense counsel to whom the defendant turns for advice regarding the legal implications of testifying. *Teague*, 953 F.2d at 1533. This has historically included, *inter alia*, a discussion of the

penalties of perjury, the possibility that the facts elicited from the defendant's testimony will support the government's theory of the case, and the potential for impeachment with prior convictions and inconsistent statements. *See generally Teague*, 953 F.2d at 1533 n.9.

The right to testify is not unconditional. *See Nix v. Whiteside*, 475 U.S. 157 (1986) (no constitutional right to commit perjury); *Harris v. New York*, 401 U.S. 222 (1971). To be sure, a defendant's decision to testify in a criminal case necessarily entails the waiver of certain constitutional rights, such as the Fifth Amendment privilege against compelled testimony, and the assumption of certain risks, such as the risk of impeachment by prior inconsistent statements and prior convictions. *See Harris*, 401 U.S. at 225 (holding that defendant who testifies could be impeached by prior contrary statements which had been ruled inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966)); *see also* Fed.R.Evid. 609. However, these conditions and risks are tolerable, and indeed laudable, because they are "consistent with the governance of trial conduct in what we have long called 'a search for truth.' " *Nix*, 475 U.S. at 171. They reflect the unassailable principle that "when defendants testify, they must testify truthfully or suffer the consequences." *United States v. Havens*, 446 U.S. 620, 626 (1980).

In accordance with these general principles, reviewing courts have often treated a defendant's *obviously perjured* testimony as positive evidence of guilt that fills in an evidentiary gap in the government's case. *See, e.g., Wright v. West*, 505 U.S. 277, 295-96 (1992) (opinion of Thomas, J.) (treating defendant's "uncorroborated and confused testimony" as affirmative evidence because

defendant "failed to offer specific information about how he had come to acquire any of the stolen items," and "*contradicted himself* repeatedly about where he supposedly had bought the stolen goods, and he gave vague, seemingly evasive answers to various other questions.") (emphasis added); *United States v. Bennett*, 848 F.2d 1134, 1138-39 (11th Cir. 1988) (defendants who were occupants of a boat loaded with weapons, $110,000 in cash, and aeronautical map with signals for radio frequencies, and who pulled up near an unoccupied vessel containing over 750 kilograms of cocaine, testified that the cash constituted gambling winnings, and that they had been out fishing, but there was no fishing equipment on the boat). Before concluding that a defendant's trial testimony was perjured, however, reviewing courts have been careful to evaluate the quality of the defendant's testimony to determine whether it was *inherently implausible* or *internally inconsistent*. *See Wright v. West, supra; Bennett, supra; see also United States v. Zeigler*, 994 F.2d 845, 849 (D.C.Cir. 1993) ("The situation would be different if the defendant's testimony, *on its face*, were utterly inconsistent, incoherent, contradictory or implausible.") (emphasis added); *United States v. Eley*, 723 F.2d 1522, 1525 (11th Cir. 1984) ("Eley's explanation is so implausible that it gives rise to positive evidence in favor of the government."). Only if a defendant's story of innocence is unbelievable or internally contradictory can an appellate court have some assurance that "when the defendant said 'black' the jury reasonably could have concluded that the truth was 'white.' " *Zeigler*, 994 F.2d at 849.

The Eleventh Circuit's sweeping new rule is unfair and unprincipled because it presumes from the jury's

verdict alone that the defendant's testimony was perjured. The rule does not distinguish between a defendant's testimony that is inherently implausible and a defendant's testimony that, as here, is plausible and consistent with the testimony of the government's cooperating witness. Indeed, on these facts, the Eleventh Circuit did not, nor could it, conclude that petitioner's testimony was implausible or inconsistent.

The flaw in the Eleventh Circuit's new rule is that it assumes too much. First, it unfairly assumes that a guilty verdict means that the jury disbelieved the defendant's testimony. There are a variety of irrational reasons why a jury may find a defendant guilty even though they believed his testimony. This might occur, for example, if a jury disliked a defendant because of his religious or unpopular political beliefs, or his prior conviction, or if the jury was unable to follow and understand the evidence and the court's instructions. Second, even accepting the assumption that the jury's verdict means that the jury disbelieved the defendant's testimony, the rule unfairly assumes that such disbelief means that the defendant perjured himself (and, thus, the fabricated evidence constitutes consciousness of guilt). In analogous circumstances, this Court recently held that "not every accused who testifies at trial and is convicted will incur an enhanced sentence under [U.S.S.G.] 3C1.1 for committing perjury." *United States v. Dunnigan*, 507 U.S. 87, 113 S. Ct. 1111, 1117 (1992). This Court reasoned that "an accused may give inaccurate testimony due to confusion,

mistake or faulty memory." *Id.*[2] The fact that an accused may have given *inaccurate* testimony does not establish consciousness of guilt. *See generally* Devitt & Blackmar, *Federal Jury Practice and Instructions*, §14.06 (1992) (a defendant's *knowingly* false explanation may reflect consciousness of guilt).

Presuming from the jury's verdict alone that a defendant's uncontradicted and plausible testimony was actually false burdens his/her right to testify and creates the intolerable risk that innocent defendants will be convicted simply because they told the truth and asserted their innocence. These conditions and consequences are not reasonably designed to further the primary goal of the criminal justice system – the search for truth and the protection of the innocent from wrongful conviction.

B. Due Process

The Eleventh Circuit's rule violates the constitutional requirement that the government prove beyond a reasonable doubt every fact necessary to constitute the crime. *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307 (1979). Certainly the jury, as the factfinder, is entitled to reject the plausible and uncontradicted testimony of a defendant on the basis of his demeanor. *See generally Glasser v. United States*, 315 U.S. 60, 80 (1942). Moreover, the fact that the defendant has presented a

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[2] In this case, the district court did not enhance the petitioner's sentence for perjury under United States Sentencing Guideline §3C1.1. Nor did the government seek an enhancement of petitioner's offense level for perjury under §3C1.1.

plausible story of his innocence does not require the reviewing court to set aside the verdict if the evidence of guilt is *otherwise sufficient*. *See United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc) (jury may choose among rational constructions of evidence and evidence need not exclude every reasonable hypothesis of innocence), *aff'd*, 462 U.S. 356 (1983). But to suggest that a plausible story of innocence presented by the defendant can somehow close a hole in the government's case and transform an irrational jury verdict into a rational one violates due process.

Judicial review of the evidence protects innocent defendants from guilty verdicts that are based on irrational factors such as the defendant's race, religion, prior conviction, or the jury's refusal to follow, inability to understand, or inattention to the evidence and the court's instructions. It is axiomatic that "juries sometimes get things wrong," *Zeigler*, 994 F.2d at 849, because if juries invariably got things right, there would be no need for judicial review of the evidence. In *Brown*, the Eleventh Circuit held for the first time "that the evidence supporting the conviction of a defendant who takes the stand and testifies in his own behalf is unreviewable." *Brown*, 53 F.3d at 315 (Moye, J., dissenting). By its new rule, the Eleventh Circuit has implicitly decided that juries never get things wrong *in cases where defendants testify* – a distinction that is based neither in logic nor empirical facts. Plainly, a jury may be motivated to return a guilty verdict by any one of the above-cited irrational factors even in cases where the defendant has testified. As such, there is no basis to destroy the protection of appellate review of

the sufficiency of the evidence in cases in which defendants testify. *Zeigler*, 994 F.2d at 850.

The Eleventh (and Seventh) Circuit's rule increases the risk that innocent persons will be wrongfully convicted. The rule applies to cases in which: 1) the evidence presented by the government is insufficient to sustain a conviction but the district court refuses to grant a judgment of acquittal at the close of the government's case, and 2) the defendant testifies in his own defense. Those cases are by definition the ones in which it is most likely that the defendant is *innocent*, not only because of the lack of evidence but also because guilty defendants are less likely to testify.[3] Nevertheless, the Eleventh (and Seventh) Circuit's rule strips defendants in such cases of sufficiency review, the primary safeguard against irrational and improper verdicts. *See generally Jackson v. Virginia*, 443 U.S. at 315. Thus, this rule violates due process.

Finally, the rule applied by the Eleventh and Seventh Circuits frustrates the search for truth. The rules that govern the procedure of criminal cases and the administration of justice should be designed to *encourage* innocent defendants to testify. Yet, this rule will undoubtedly *discourage* innocent defendants from testifying in cases where the evidence is lacking but the district court fails to

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[3] As a general proposition, guilty defendants are less likely to testify than innocent defendants because of the potential penalties of perjury, the inability of a guilty defendant to fashion a coherent story of innocence and withstand pointed cross-examination, and the ethical considerations that require a criminal defense lawyer to advise a client he/she knows is guilty not to testify.

grant a judgment of acquittal at the close of the government's case. In that regard, criminal defense lawyers who practice in the district courts of these circuits will often be in the unenviable position of advising their innocent clients not to testify so as to preserve for appellate review a meritorious claim of insufficient evidence. As a result, the jury will be deprived of the truth.

CONCLUSION

For the foregoing reasons, Petitioner Hernandez's petition for writ of certiorari should be granted.

Respectfully submitted,

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January 2, 1996

Supreme Court, U.S.
FILED
FEB 5 1996
CLERK

No. 95-857

In the Supreme Court of the United States

OCTOBER TERM, 1995

CAESAR HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for possessing cocaine with the intent to distribute it.

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In the Supreme Court of the United States

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No. 95-857

CAESAR HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the judgment is noted at 65 F.3d 181 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1995. A petition for rehearing was denied on October 18, 1995. Pet. App. 6a. The petition for a writ of certiorari was filed on December 1, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 2). The district court sentenced him to a term of 121 months' imprisonment, to be followed by a five-year period of supervised release.[1] The court of appeals affirmed. Pet. App. 1a-3a.

1. a. On August 20, 1991, confidential informant Luis Escobedo and a female informant met with Jose Pereira-Garcia (Pereira) as part of a Drug Enforcement Administration (DEA) narcotics investigation. The female informant was introduced to Pereira as Escobedo's girlfriend; her function was to negotiate with Pereira on Escobedo's behalf. She later met with Pereira to discuss a debt that Escobedo owed to Pereira. Gov't C.A. Br. 3.

As a result of those meetings, DEA agents arranged a controlled delivery of 20 kilograms of cocaine to Pereira on September 5, 1991. Agents packaged the cocaine in four five-kilogram bundles and placed the bundles in a cardboard box. The cocaine overflowed the box; when its top flaps were

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[1] At the close of all the evidence, the district court entered a judgment of acquittal with regard to Count 1 of the indictment, which charged petitioner with conspiring to possess cocaine with the intent to distribute it. Gov't C.A. Br. 2. At an earlier trial, the jury had returned verdicts of guilty on both counts of the indictment, but after the verdict was returned, the district court declared a mistrial and granted petitioner a new trial. The court of appeals affirmed the new trial order (*ibid.*).

folded together, they were raised one or two inches. Gov't C.A. Br. 3.

Agents placed the cocaine in the back of a red Chevrolet Blazer. The back of the Blazer was otherwise empty. The cardboard box with raised flaps was visible from outside the Blazer through the vehicle's windows. In addition, the cocaine had a noticeable odor. Gov't C.A. Br. 4.

Pereira had given instructions to park the Blazer behind a shoe store. To facilitate surveillance, however, the agents decided to park the Blazer in front of the store. Undercover detective Luis Fernandez drove the Blazer to the store. He had been instructed to say that he owned the 20 kilograms of cocaine and was helping Escobedo to pay his debt. Gov't C.A. Br. 4.

Detective Fernandez arrived at the shoe store in the red Blazer at about 5:00 p.m. He and the female informant, who arrived separately, met and entered the store. Fernandez gave the keys to the Blazer to Pereira. Shortly thereafter, Fernandez and the female informant left the store, got into the informant's car, and drove off. Gov't C.A. Br. 4.

Petitioner, who was Pereira's brother-in-law, thereupon walked out of the shoe store, got into the Blazer, and drove away. Officers in approximately eight unmarked cars began to follow petitioner, who drove north on Southwest 137th Avenue for a few blocks to Southwest 22d Street, towards his home at 13420 Southwest First Street. At Southwest 22d Street, however, petitioner turned left and accelerated, driving at more than 60 miles per hour in a residential neighborhood with a 35-mile-per-hour speed limit. Gov't C.A. Br. 4-5.

After petitioner changed direction and accelerated, the officers turned on their blue lights and sirens and pursued petitioner at high speed as he led them on a circuitous route for several blocks. Although he had originally driven north, when the chase ended, he was traveling south, away from his home. During the chase, an agent approached petitioner head-on and stopped on a diagonal in petitioner's path. Petitioner veered onto a lawn to avoid the agent's vehicle and continued past him at high speed. Eventually, other agents used their vehicles to box in the Blazer and forced it to stop, even though petitioner had tried to avoid them by driving onto the sidewalk and through other yards. The agents arrested petitioner and recovered the 20 kilograms of cocaine, which had a wholesale value of $300,000 and a retail value of $2 million. Gov't C.A. Br. 5.

b. At the close of the government's case, petitioner moved under Federal Rule of Criminal Procedure 29(a) for a judgment of acquittal. The district court denied that motion. Gov't C.A. Br. 2. Petitioner thereupon testified that Pereira had telephoned him and asked him to come immediately to the shoe store, without explaining why he was needed, and that when he arrived at the store Pereira asked him to drive the Blazer home. He admitted driving the Blazer away from the store, but denied that he had seen the cocaine-filled box, that he had known that there was cocaine in the Blazer, or that he had smelled an unusual odor in the Blazer. *Id.* at 6.

Petitioner further testified that while driving the Blazer he realized that he did not know whether Pereira wanted him to drive to Pereira's home or his own, so he decided to return to the shoe store to ask Pereira for directions. He conceded driving around a

vehicle approaching him head-on in order to avoid a collision, but denied knowing that he was being pursued by police; he testified that he had not seen blue lights and that he had not heard any sirens. Gov't C.A. Br. 6-7.

Petitioner admitted that, on two or three occasions during the six months preceding September 5, 1991, he had helped Pereira to count large quantities of cash, between $100,000 and $150,000 on each occasion. On one such occasion, petitioner delivered the money he and Pereira had counted to a man named "Armando." Petitioner admitted that he suspected the money he had counted was derived from criminal activity, but explained that he believed that Pereira had stolen that money from drug dealers by taking luggage containing money from Eastern Airlines, where, before 1991, Pereira had worked as a baggage handler. Petitioner stated that he believed that the money delivered to Armando was a commission for Armando's participation in the scheme. Gov't C.A. Br. 7-8.

Petitioner denied helping Pereira to hide money in a secret compartment in a pickup truck, receiving compensation from Pereira for helping him to count money, or expecting compensation for driving the Blazer on September 5, 1991. He conceded that Pereira had loaned him approximately $30,000 before 1991, but said that he had repaid those loans and introduced checks totalling $16,000 that he said represented loan payments. Gov't C.A. Br. 8-9.

Petitioner testified that Pereira had spent large amounts of money on members of his family, including petitioner and his wife. Petitioner testified that he never asked Pereira the source of that money, but believed the money might have come from the Pereira

family's shoe store. Petitioner testified that he did not know whether Pereira or Pereira's father owned the store, which was a father-and-son operation. Gov't C.A. Br. 9.

c. The government called Pereira, who had pleaded guilty before petitioner's trial to Count 1, as a rebuttal witness. Gov't C.A. Br. 2 n.1. Pereira testified that he had been helped by petitioner to count money from Escobedo on four to eight occasions, and that the total the two men counted was between $1.5 million and $2 million. Pereira further testified that on three or four occasions petitioner had helped him to conceal money in a hidden compartment in a van parked in petitioner's garage. The van belonged to Colombian drug dealers, and Pereira transferred the money to them by parking the van in a location where they could retrieve it. Pereira stated that he had paid 80% of the purchase price for petitioner's home and had given petitioner another $20,000 for expenses. Pereira said, however, that he had not told petitioner that the Blazer contained cocaine on September 5, 1991, that petitioner was not involved in narcotics with him, and that petitioner did not know that he was involved with narcotics. *Id.* at 10-11.

d. At the close of all the evidence, petitioner renewed his motion for a judgment of acquittal. The district court granted the motion on Count 1 of the indictment (cocaine conspiracy), but denied it as to Count 2 (possession of cocaine with the intent to distribute it). Gov't C.A. Br. 2.

2. On appeal, petitioner challenged (see Pet. C.A. Br. 13-24) the sufficiency of the evidence supporting his conviction. The court of appeals affirmed. Pet. App. 1a-3a.

After noting (Pet. App. 1a-2a) that petitioner's defense was lack of knowledge that there was cocaine in the Chevrolet Blazer, the court reviewed (*id.* at 2a) the government's evidence. That evidence included Pereira's testimony that petitioner had helped him to count between $1.5 million and $2 million in cash; the fact that petitioner had been arrested after being the driver and sole occupant of a vehicle containing 20 kilograms of cocaine; and the fact that petitioner had led agents on a circuitous high-speed chase through a residential neighborhood before his arrest. The court acknowledged (*ibid.*) that petitioner had testified that he had not seen the agents' lights or heard their sirens, and was not trying to flee the agents. The court noted, however, that the jury was entitled to disbelieve that testimony and to believe that the opposite was true (*ibid.*). It added that "where some corroborative evidence of guilt exists for the charged offense * * * and the defendant takes the stand in his own defense, the defendant's testimony, denying guilt, may establish, by itself, elements of the offense" (*ibid.*, quoting *United States* v. *Brown*, 53 F.3d 312, 314-315 (11th Cir. 1995), petition for cert. pending, No. 95-6419 (filed Oct. 9, 1995)). The court concluded (Pet. App. 2a-3a) that in light of the government's affirmative evidence and petitioner's testimony, which the jury was free to disbelieve, it could not say that a reasonable jury could not have found petitioner guilty.[2]

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[2] The court of appeals summarily rejected petitioner's other claims on appeal. Pet. App. 1a n.*.

ARGUMENT

Petitioner contends (Pet. 6-12) that the court of appeals erred in stating that a defendant's testimony denying guilt may, in certain circumstances, be considered by a reviewing court in determining whether the evidence of guilt was sufficient. While there is some disagreement among the courts of appeals as to the circumstances under which such testimony may be taken into account in determining sufficiency, the court of appeals' decision in this case was correct under any approach to that question. Moreover, the government's evidence, standing alone, was sufficient to establish petitioner's guilt. This case therefore does not present a suitable vehicle for resolving that conflict. Furthermore, a recent amendment to Federal Rule of Criminal Procedure 29(b) has largely obviated the question posed by petitioner, by enabling defendants in many cases to preserve the right to claim on appeal that the evidence presented by the government, standing alone, was insufficient.[3]

1. The evidence is sufficient to support a conviction where, viewing the evidence in the light most favorable to the prosecution, with all reasonable inferences taken in support of the verdict, a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The elements of the offense described by 21 U.S.C. 841(a)(1) are that the defendant (1) knowingly (2) possessed cocaine (3)

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[3] Two petitions pending before the Court raise the same issue that is presented in the instant petition. See *Brown* v. *United States*, petition for cert. pending, No. 95-6419 (filed Oct. 9, 1995); *Mullis* v. *United States*, petition for cert. pending, No. 95-693 (filed Oct. 10, 1995).

with the intent to distribute it. See, *e.g.*, *United States* v. *Rodgers*, 18 F.3d 1425, 1429 (8th Cir. 1994); *United States* v. *Nelson*, 6 F.3d 1049, 1053 (4th Cir. 1993); *United States* v. *Ocampo*, 937 F.2d 485, 488 (9th Cir. 1991). In this case, those elements were established by the evidence presented by the government, standing alone.

The government's evidence in its case-in-chief established that, when petitioner was arrested, he was the driver and sole occupant of a vehicle containing 20 kilograms of cocaine with a wholesale value of $300,000 and a retail value of $2 million. That evidence further established that, immediately before petitioner's arrest, he fled from the police in a high-speed circuitous chase through a residential neighborhood. The jury was entitled to infer from petitioner's evasive and irregular conduct while driving that he was aware that the package inside the vehicle contained contraband, and that petitioner, aware of the incriminating nature of that contraband, was seeking to elude the authorities. See Gov't C.A. Br. 15-16. As the district court found in denying petitioner's motion for judgment of acquittal after the close of the government's case, that evidence supplied a sufficient basis for a jury to find the elements of the offense beyond a reasonable doubt.

By presenting evidence following the denial of his motion for judgment of acquittal, petitioner waived his right to have the sufficiency of the evidence based solely on the evidence presented in the government's case-in-chief. See Fed. R. Crim. P. 29 advisory committee's note (1994 amendment) (defendant who presents evidence after the denial of a motion for judgment of acquittal made after government's case "run[s] the risk that [the evidence offered by the

defense] will support the government's case"); Fed. R. Crim. P. 29(b) (only where district court reserves ruling on motion for judgment of acquittal does defendant who later offers evidence retain right to have sufficiency motion decided based on evidence at time of motion); *United States* v. *Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991), aff'd on other grounds, 506 U.S. 534 (1993); *United States* v. *Allison*, 908 F.2d 1531, 1535 (11th Cir. 1990), cert. denied, 500 U.S. 904 (1991); *United States* v. *Kenny*, 645 F.2d 1323, 1346 (11th Cir.), cert. denied, 452 U.S. 920 (1981). The evidence offered by the government in its rebuttal case was therefore properly considered by the court of appeals. That evidence further demonstrated that petitioner knew and had reason to know that the delivery of the goods inside the Blazer related to the narcotics trade. In particular, Pereira, petitioner's brother-in-law, testified that on as many as eight occasions in the six months before September 5, 1991, petitioner had helped Pereira to count money derived from the sale of cocaine, and that on some of those occasions, petitioner assisted Pereira to stash large sums of cash in a concealed compartment in a van belonging to Colombiana. On another occasion, petitioner delivered a sum of that cash to a man named "Armando" at Pereira's request. See Gov't C.A. Br. 16 (reviewing rebuttal evidence). Thus, taking into account only the evidence offered by the government, the evidence was sufficient to support petitioner's conviction.

2. The court of appeals based its holding that the evidence was sufficient on all the evidence in the case: the evidence presented by the government as well as petitioner's testimony, which, the court noted, "the jury was free to disbelieve." Pet. App. 2a (citing *Brown*, 53 F.3d at 314-315). The court did not state

that the evidence offered by the government, standing alone, would not have been sufficient.

Even if the government's evidence, standing alone, had been insufficient, it was appropriate for the court of appeals to consider petitioner's testimony in evaluating his sufficiency claim. It is well established that, in addition to considering affirmative evidence of guilt offered on either the government or defense case, a jury may draw negative inferences from a defendant's testimony and consider those inferences in reaching a verdict. See *United States* v. *Friedman*, 998 F.2d 53, 57 (2d Cir. 1993) (jury entitled to draw negative inferences from defendant's testimony at trial); *Zafiro*, 945 F.2d at 888 (where defendant takes the stand "and denies the charges and the jury thinks he's a liar, this becomes evidence of guilt to add to the other evidence"); *United States* v. *Bauer*, 19 F.3d 409, 412 n.2 (8th Cir. 1994) (same); *Kenny*, 645 F.2d at 1346 ("When the defendant elects to testify, he runs the risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth."); *Allison*, 908 F.2d at 1535 (jury may reject defendant's explanation "as a complete fabrication" and view "[the] defendant's false explanatory statement as substantive evidence proving guilt"). A plurality of this Court recently concluded that, when a jury disbelieves a testifying defendant, it is "further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt." *Wright* v. *West*, 505 U.S. 277, 296 (1992) (opinion of Thomas, J.).[4]

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[4] Chief Justice Rehnquist and Justice Scalia joined Justice Thomas's plurality opinion. 505 U.S. at 278. None of the six Justices who concurred in the judgment disagreed with Justice

The question whether a jury may treat a defendant's false testimony as affirmative evidence of guilt is, of course, distinct from the question of when an appellate court may consider that false testimony in evaluating whether the evidence against him was sufficient. On that question, the courts of appeals have reached different conclusions. In *Zafiro*, *supra*, the Seventh Circuit stated in dicta that the false testimony of a defendant in denying the charges against her "becomes evidence of guilt to add to the other evidence" considered in the inquiry into sufficiency. See 945 F.2d at 888. As petitioner notes (Pet. 6-10), the District of Columbia Circuit has taken a different approach. It has held that, although the substance of a defendant's testimony may be considered in determining the sufficiency of the evidence, it is generally improper for an appellate court to assume that the jury may have drawn negative inferences from a testifying defendant's demeanor. *United States* v. *Zeigler*, 994 F.2d 845, 848-850 (D.C. Cir. 1993); see *United States* v. *Thorne*, 997 F.2d 1504, 1511 (D.C. Cir.) (same), cert. denied, 114 S. Ct. 568 (1993); *United States* v. *Jenkins*, 928 F.2d 1175, 1178-1179 (D.C. Cir. 1991); see also *United States* v. *Sliker*, 751 F.2d 477, 495 n.11 (2d Cir. 1984) (reaching same result), cert. denied, 470 U.S. 1058, 471 U.S. 1137 (1985).[5]

Thomas's statement that a defendant's testimony could be considered as affirmative evidence of guilt. See *id.* at 297-316. In his opinion concurring in the judgment, Justice Souter stated that a similar state evidentiary rule "has the virtue of much common sense." *Id.* at 315.

[5] The First and Tenth Circuits have recently noted the disagreement between *Ziegler* and *Zafiro*, but have not found it necessary to decide which view is correct. See *Walker* v.

The present case is not a suitable vehicle for resolving the differing approaches articulated by the Seventh Circuit and the District of Columbia Circuit. First, as we have explained, the evidence presented in the government's case-in-chief and in its rebuttal case was itself sufficient to support petitioner's conviction, and the court of appeals did not suggest otherwise. Resolution of the question whether the demeanor of a testifying defendant may be considered by a reviewing court upon a sufficiency challenge would therefore have no impact upon the resolution of this case.

Second, even if the evidence presented in the government's case-in-chief were not itself sufficient, under the approach taken by the District of Columbia Circuit, an appellate court would be entitled to conclude that the jury drew negative inferences from petitioner's denials of guilt. That circuit has held that an appellate court may treat a defendant's denial of guilt as substantive evidence against him when the "defendant's testimony, on its face, [is] utterly inconsistent, incoherent, contradictory or implausible." *Zeigler*, 994 F.2d at 849. That exception applies in

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Waltham Housing Authority, 44 F.3d 1042, 1049-1050 (1st Cir. 1995); *Stallings* v. *Tansy*, 28 F.3d 1018, 1024 (10th Cir. 1994). The other cases on which petitioner relies (Pet. 6) are inapposite. Those cases merely stand for the proposition that a factfinder's disbelief of a party's testimony does not by itself suffice to meet the opposing party's burden of proof. See, *e.g.*, *Nishikawa* v. *Dulles*, 356 U.S. 129, 137 (1958) (denaturalization proceeding); *United States* v. *Aulicino*, 44 F.3d 1102, 1114-1115 (2d Cir. 1995); *United States* v. *Slone*, 601 F.2d 800, 804 (5th Cir. 1979); *United States* v. *Pechenik*, 236 F.2d 844, 847 (3d Cir. 1956). Neither the Eleventh Circuit in *Brown* nor the Seventh Circuit in *Zafiro* took issue with that proposition.

this case. The court of appeals did not suggest that it was basing its finding of sufficiency at all upon petitioner's demeanor while testifying, and the facts would support the conclusion that it found the jury entitled to disbelieve that testimony itself, based upon its inherent implausibility. Pet. App. 2a. Petitioner's claims that he never saw the flashing blue lights or heard the sirens of the agents' pursuing cars, that he reversed course and began to drive at a high rate of speed in order to return to the .store to ask Pereira for directions, and that he did not see or smell the bulging box that stood alone inside the back of the car were all patently "incoherent, contradictory, or implausible." *Zeigler*, 994 F.2d at 849. Also implausible was petitioner's testimony that he believed the substantial sums of money that Pereira had spent on petitioner's family had come from operation of a shoe store.

3. Finally, in light of a recent amendment to Federal Rule of Criminal Procedure 29(b), it is unlikely that the issue of when a reviewing court may consider a defendant's testimony denying involvement in an offense as evidence of guilt will occur with any frequency. Before that amendment took effect, a defendant who elected to present evidence in a case in which the district court reserved ruling on a motion for a judgment of acquittal at the close of the government's case-in-chief would "run the risk that such evidence will support the government's case." Fed. R. Crim. P. 29 advisory committee's note (1994 amendment). The recent amendment to Rule 29(b) has relieved the defendant of that risk, by providing that, when a district court has reserved ruling on a motion for a judgment of acquittal, "it must decide the motion on the basis of the evidence at the time the ruling was

reserved." Fed. R. Crim. P. 29(b). The advisory committee note to the amended Rule further states that appellate review of such a ruling will be "similarly limited" to the evidence that had been presented at the time the ruling was reserved. Fed. R. Crim. P. 29 advisory committee's note (1994 amendment).

As a result, in future cases in which a defendant moves for a judgment of acquittal at the close of the government's case-in-chief and in which the sufficiency of evidence presented at that point presents a close question, the district court may simply reserve ruling on such a motion at the close of the government's case-in-chief. Because such action will preserve for appellate review the issue whether the government's evidence alone was sufficient, the issue whether the defendant's denials of guilt could be taken into account in a sufficiency inquiry will not arise. It is true, of course, that that issue may still arise where a district court denies a motion for judgment of acquittal made at the close of the government's case, and where the sufficiency of the government's evidence standing alone presents a close question on appeal. Under Rule 29(b) as amended, however, the defendant would have the opportunity in such cases to ask the district judge to reserve ruling on that motion so as to preserve his right on appeal to challenge the sufficiency of the government's evidence alone. Where the government's evidence is not clearly sufficient by itself, it is reasonable to expect that such requests will often be granted. Thus, the issue raised by the petition appears to be of diminishing importance and does not merit review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1996

Supreme Court, U.S.
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No. 95-857

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CAESAR HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As the petition demonstrated, this case raises an important and recurring question that has divided the federal courts of appeals: whether a criminal defendant may be convicted simply because he has taken the stand and plausibly denied guilt. Unable to dispute the importance of this question, the Government argues that this case is not a proper vehicle for considering it and that the question will not recur in the future. These arguments are without merit.

1. The Government does not — and cannot — dispute that the issue presented in this case warrants this Court's attention. The petitioner showed (Pet. 6-10) that the lower courts are divided over the proper treatment on appeal of apparent disbelief of a defendant's exculpatory testimony. Far from denying this conflict, the Government concedes its existence. Opp. 8. Indeed, the Government acknowledges that the First Circuit has "recently noted the disagreement" among the circuits over this issue. Opp. 9, 12 n.5 (citing *Walker v. Waltham Housing Authority*, 44 F.3d 1042, 1049-50 (1st Cir. 1995)). Nor does the Government suggest that this conflict will resolve itself absent this Court's attention. Thus, it is undisputed that this Court's intervention is warranted.

2. The Government does not attempt to defend the reasoning of the decision below. As the petition established (Pet. 12-13), the decision below sharply departed from traditional practice and applied a rule of sweeping generality: that whenever there is "some corroborative evidence of guilt," a defendant's testimony denying guilt is sufficient to sustain a conviction. Far from defending this rule, the Government appears to concede that it conflicts with this Court's decision in *Nishikawa v. Dulles*, 356 U.S. 129, 137 (1958). Specifically, the Government acknowledges that in *Nishikawa* this Court held that "a factfinder's disbelief of a party's testimony does not by itself suffice to meet the opposing party's burden of proof." Opp. 13 n.5 (citations omitted). Moreover, the Government does not attempt to reconcile the decision below with *Nishikawa*: it simply

notes that the Eleventh Circuit did not "[take] issue" with *Nishikawa*. Opp. 13 n.5.[1]

3. The Government's primary contention (Opp. 8-14) is that, even without the conclusive presumption applied by the Eleventh Circuit, the evidence in the record is sufficient to prove that petitioner knew of the cocaine concealed in the Blazer he was driving when arrested. The decision below did not, however, rely on such alternative grounds, and it is inappropriate for this Court at the certiorari stage to conduct an independent review of the sufficiency of the evidence in the record, especially in light of the omissions in the Government's analysis of that record.

a. The Government's analysis ignores direct and probative evidence that petitioner did not know of the cocaine concealed in the Blazer. The Government itself presented evidence establishing that law enforcement agents concealed cocaine inside a box and placed that box in the rear compartment of the Blazer (1 Trans. 55); that petitioner did not look into the rear compartment or otherwise inspect the box (1 Trans. 73-74, 108); and that the box was recovered in the position where it had been earlier placed (1 Trans. 104). This demonstrates that petitioner could only have learned of the cocaine if he had been told of it. The Government, however, also presented unrefuted evidence that no one informed petitioner about the cocaine: Jose Pereira, the Government's cooperating witness, testified that neither he nor anyone else told petitioner of the contents of the box. 2 Trans. 215-16, 220-21. Moreover, Petitioner's testimony not only corroborated the evidence offered by the Government; it also provided a plausible and innocuous explanation for his use of the

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[1] To the extent that the Government acknowledges the conflict between *Nishikawa* and the decision below, this Court should grant the petition, vacate the decision below, and remand for further consideration in light of *Nishikawa*. *See Stutson v. United States*, 64 U.S.L.W. 3459 (U.S. Jan. 8, 1996) (per curiam).

Blazer: he was performing what he thought to be a minor favor for his brother-in-law. 2 Trans. 67-72, 98.[2]

b. The Government also neglects to describe fully the circumstantial evidence upon which it relies. For example, the Government suggests (Opp. 3, 14) that an odor emanating from the cocaine concealed in the Blazer might have made petitioner aware of the cocaine. It fails, however, to acknowledge that there was no testimony that petitioner had smelled cocaine before, no testimony that he could recognize its solvent-like odor, and no testimony that such an odor was discernible in the Blazer. 1 Trans. 27-28, 56-58. Likewise, while the Government contends that the box in which the cocaine was concealed was "bulging" and its top flaps were "raised one or two inches," Opp. 2-3, 14, it fails to inform the Court that there was no evidence that petitioner ever saw the box or that, if he had, he could have discerned its contents.[3] And when the Government asserts that Pereira loaned petitioner $30,000 and "spent large amounts of money on members of his family," Opp. 5, 14, it fails to acknowledge that the loans were made when petitioner's daughter (and Pereira's niece) fell seriously ill and when petitioner purchased a home (1 Trans. 45-47, 50) and that Pereira's largest

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[2] Contrary to the Government's suggestion (Opp. 13), this testimony would not warrant a negative inference under the approach taken by the District of Columbia Circuit. That approach permits appellate courts to draw negative inferences only when a defendant's testimony is "utterly inconsistent, incoherent, contradictory or implausible." *United States v. Zeigler*, 994 F.2d 845, 849 (D.C. Cir. 1993). Plainly, given the evidence corroborating petitioner's testimony, that is not the case here.

[3] The Government also fails to explain how it would be relevant if petitioner had smelled or otherwise become aware of the cocaine *after* entering the Blazer. As the Government acknowledges (Opp. 8-9), one of the elements of the offense for which petitioner was convicted is intent to distribute cocaine. That petitioner may have become aware of cocaine concealed in the vehicle after he entered it does not establish such an intent.

expenditure was for a house for his own mother (2 Trans. 39-42) — hardly suspicious circumstances.

c. Finally, the Government fails to acknowledge the limited probative value of the circumstantial evidence upon which it relies. For example, the Government relies (Opp. 9) on evidence of supposed flight, even though such evidence has been "widely acknowledged" as "only marginally probative." *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977) (quotation omitted); *see also Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963) (noting that this Court has "consistently doubted" the probative value of flight). Similarly, the Government points (Opp. 14) to supposedly false testimony without disputing that such evidence is of only "modest probative value." Pet. 14 (quotation omitted). Likewise, it relies (Opp. 10) on prior acts evidence without acknowledging that the probative value of such evidence is dependent on the existence of something not present here: "a close parallel between the crime charged and the acts shown." *United States v. Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975) (Friendly, J.) (citation omitted), *cert. denied*, 425 U.S. 958 (1976).

In the face of the direct and unrefuted evidence presented by the Government itself that petitioner did not know of the cocaine concealed in the Blazer, this circumstantial evidence cannot establish petitioner's knowledge — absent the sort of blanket presumption employed in the decision below.

4. The Government's final argument (Opp. 14-15) is that the issue presented in this case is unlikely to recur in the future. While the Government does not deny that this issue has recurred frequently in the past, *see* Pet. 16, the Government contends that it will not do so in the future due to a 1994 amendment to Rule 29 of the Federal Rules of Criminal Procedure. This argument is without merit.

First, Rule 29 applies only in federal criminal cases. Questions concerning the probative value of a defendant's denial of guilt, however, frequently recur in state court, where the vast majority of criminal cases are brought. *See, e.g., Connecticut v. Alfonso*,

490 A.2d 75, 81 (Conn. 1985); *People v. Morrin*, 187 N.W.2d 434, 451 & n.54 (Mich. Ct. App. 1971); *Pennsylvania v. Shocker*, 292 A.2d 492, 494 (Pa. Super. Ct. 1972) (per curiam); *Rhode Island v. Mattatall*, 603 A.2d 1098, 1109 (R.I. 1992). Moreover, as the Government recognizes (Opp. 12 n.5), similar issues frequently arise in federal civil and administrative proceedings. *See, e.g., Nishikawa*, 356 U.S. 129; *Walker v. Waltham Housing Auth.*, 44 F.3d at 1050; *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662, 680 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991). As a consequence, whatever effect the amendment to Rule 29(b) may have in federal criminal cases, the issue presented in this case will still frequently recur in other contexts.

Second, the Government offers little reason to think that the 1994 amendment to Rule 29(b) will prevent this issue from recurring in future federal criminal cases. The Government correctly states (Opp. 15) that under the amended rule defendants are able to request that judgment on motions to acquit brought at the close of the Government's case in chief be reserved until the end of trial. The Government does not, however, argue that competent defense counsel will in fact make such requests. Nor is this surprising. When a judge grants a motion to acquit at the close of the Government's case in chief, the Government cannot appeal the acquittal because of the Double Jeopardy Clause's prohibition on impaneling a second jury. *See Smallis v. Pennsylvania*, 476 U.S. 140 (1986). When, however, a defendant is acquitted after the verdict has been entered, there is no double jeopardy problem and the Government may appeal the acquittal. *See* W. LaFave & J. Israel, *Criminal Procedure* § 24.1(d), at 66 (1984). Thus, competent defense counsel will be loath to request deferral of motions to acquit and thereby risk reversal of an acquittal on appeal. Furthermore, while Rule 29(b) permits judges to reserve ruling on motions to acquit, it does not compel them to do so, and the Government offers little reason to suppose that trial judges will uniformly depart from the pre-amendment practice of deciding such motions when they are made.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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